No. 18-

IN THE

Supreme Court of the United States

GOSPEL FOR ASIA, INC., *et al.*,
Petitioners,

v.

GARLAND D. MURPHY, III., M.D., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a RICO class may be certified under Federal Rule of Civil Procedure 23(b)(3) based on a presumption that all class members were injured by the allegedly fraudulent activity, even though defendants presented unrebutted evidence that the presumption is plainly not true in many individual instances.

2. Whether all circuit courts of appeals should apply the same standards in deciding whether to grant petitions for interlocutory review of class certification orders under Federal Rule of Civil Procedure 23(f).

PARTIES TO THE PROCEEDING

Petitioners (defendants-petitioners below) are Gospel for Asia, Inc., K.P. Yohannan, Gisela Punnose, Daniel Punnose, David Carroll, and Pat Emerick. Gospel for Asia-International was also named as a defendant in the Complaint, but no longer existed when the lawsuit was filed.

Respondents (plaintiffs-respondents below) are Garland D. Murphy, M.D. and Phyllis Murphy, individually and on behalf of a certified class of individuals who made charitable donations to Gospel for Asia, Inc. over a period of almost ten years.

RULE 29.6 STATEMENT

Petitioner Gospel for Asia, Inc. is a non-profit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's orders (Pet. App. 34a-35a) are not reported. The district court's opinion granting class certification is reported at 327 F.R.D. 227 and reproduced at Pet. App. 1a-33a.

JURISDICTION

The Eighth Circuit entered its judgment denying petitioners' request for interlocutory appeal of the class-certification order on October 16, 2018. Pet. App. 34a. The Eighth Circuit denied petitioners' timely petition for rehearing and rehearing en banc on November 18, 2018. Pet. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves subsections (b)(3) and (f) of Federal Rule of Civil Procedure 23, which state:

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

* * *

(f) **Appeals**. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered …. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

INTRODUCTION

This civil RICO case presents important and recurring questions of class action procedure. It arises out of allegations that a charity, Gospel for Asia, defrauded over 180,000 donors over a period of almost ten years when it allegedly failed to spend donations strictly in accordance with the donors' wishes. In addition to denying the allegations of fraud, defendants presented unrebutted evidence that individual donors were inspired to donate for a variety of different reasons, and fewer than 2% reported that they donated because of statements that funds would be expended in accordance with donor designations. That fact by

itself should have precluded class certification. Litigation of the individual questions of whether each class member relied on any representations about the use of donor funds will overwhelm the trial, predominating over any allegedly common questions about whether the representations were false. See Fed. R. Civ. P. 23(b)(3). Indeed, the drafters of Rule 23(b)(3) specifically acknowledged that a fraud case "may be unsuited for treatment as a class action" when there is such "material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed." Fed. R. Civ. P. 23(b)(3) advisory committee's note to 1996 amendment.

The district court nevertheless granted class certification. Citing cases from the Second, Tenth and Eleventh Circuits, the court reasoned that individualized inquiries would not be needed because plaintiffs and the court could simply presume that every donor relied on the representations about the use of donated funds, and that none would have donated had they known their contributions would not be spent precisely as they specified. The Eighth Circuit then denied defendants' timely petition for interlocutory review under Rule 23(f). That decision warrants this Court's review.

First, the class certification decision is inconsistent with decisions from the Fifth and Ninth Circuits holding a RICO class action cannot be certified based on a presumption of reliance when there is evidence that the presumption is not true in many, if not most, individual cases. It is also inconsistent with decisions of this Court. Class certification based on a presumption of reliance relieves plaintiffs of the burden of proving that common questions do, in fact, predominate over individual questions, in contravention of

Comcast Corp. v. *Behrend*, 569 U.S. 27, 33 (2013). Moreover, it deprives defendants of the ability to litigate their "defenses to individual claims," in contravention of *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011).

Second, the Eighth Circuit's summary denial of defendants' petition for interlocutory review implicates a longstanding and well-acknowledged circuit split on the criteria circuit courts should apply in exercising their discretion to grant or deny interlocutory review of class certification orders under Rule 23(f). This circuit split also warrants this Court's review because a litigant's ability to obtain interlocutory review should not vary by circuit.

STATEMENT OF THE CASE

1. Gospel for Asia is a Christian missionary organization that raises money to support local missionary efforts in India and other South Asian nations. Organizations in those nations supported by Gospel for Asia principally operate through four programs: (1) a National Missionaries program, which pays the salaries and living expenses of local missionaries; (2) the "Bridge of Hope" program, which provides financial assistance for the basic needs and education of children sponsored by donors; (3) community development programs, which provide families or local communities with such items as animals (*e.g.*, goats, chickens), tools (*e.g.*, sewing machines, fishing nets), and basic infrastructure (*e.g.*, water wells, toilets) so they can better support themselves; and (4) disaster assistance programs for victims of natural disasters. See 8th Cir. App. 394-95. Money raised in the United States is sent to organizations (referred to as "field partners") that in turn invest the funds in the missionary work and also distribute the funds to the lo-

cal churches and pastors to assist people in their communities. Pet. App. 2a-3a & n.2.

Gospel for Asia solicits donations in a variety of ways. Its representatives give presentations in churches throughout the United States. Pet. App. 3a. It has a website and broadcasts a weekly radio show. *Id.* And it sends catalogs and other written and electronic mailings to individuals. *Id.* at 3a-4a. A donor may request that the donation be used for a specific program or item by checking a box on the order form or by adding the item (*e.g.*, "Jesus wells") to their online "shopping cart." *Id.* at 3a. But the solicitation materials appeal to more than a desire to fund a specific project or purchase a particular item listed in a catalog. They ask donors to support Gospel for Asia's overall religious mission. For example, a Christmas catalog attached to the complaint features a donor who explained that she gave because she wanted to "teach [her] children that Christmas is about giving, not just receiving" and "to make sure that in our giving, the Good News of Jesus would be shared." Compl., Dist. Ct. Dkt. 1-2, at 2.

The website and many written materials in use during the class period did contain a statement that 100% of donations designated for use in the mission field are sent to the field. Pet. App. 3a. However, some mailings did not include this "100% statement," and it no longer appears on the website. See 8th Cir. App. 400, 450-61. In addition, Gospel for Asia sent each donor a receipt with a disclaimer stating that although it is committed to honoring the donor's specified designation, it "has complete discretion and control over the use of all donated funds." *Id.* at 401; see also *id.* at 464, 467, 474.

2. This lawsuit involves plaintiffs' claim that Gospel for Asia committed fraud and violated the federal

RICO Act and the Arkansas Deceptive Trade Practices Act by failing to "spend the donated—and designated—money in accordance with the donors' wishes or with [Gospel for Asia's] representations." Pet. App. 5a. The complaint alleges that defendants made "materially false" or "materially misleading" statements about how donated funds would be spent; that these allegedly false statements caused donors to contribute; and that if "Defendants had fully disclosed to Plaintiffs and the Class that their contributions would not be spent as they specified, Plaintiffs and the members of the Class would not have made the contributions." Compl., Dist. Ct. Dkt. 1 ¶¶ 57, 63, 72, 75.

Plaintiffs asked the district court to certify a class of approximately 180,000 people in the United States who donated a combined total of about $375 million to Gospel for Asia between January 1, 2009 and September 10, 2018, and designated that their donation be used for a particular project code. Pet. App. 5a & n.4, 31a. They claimed class certification was warranted because Gospel for Asia "made substantially uniform representations throughout the class period that 100% of what donors gave for sponsorship in the field would in fact be sent to the mission field." *Id*. at 22a. Plaintiffs also submitted evidence purporting to show that Gospel for Asia failed to transfer donations to the mission field on a timely basis, had deficient accounting practices, and spent "donor restricted gifts" for other purposes "while considering other funds spent on the field as fulfilling donor restrictions." 8th Cir. App. 174-78.

Notably, plaintiffs provide no evidence to substantiate their allegation that the 100% statement in the solicitation materials is what caused people to donate to Gospel for Asia. Instead, plaintiffs claimed the

court could simply *infer* that class members relied on the 100% statement, and that none would have donated if they had known that some of the donations might be not used for the specific items designated. 8th Cir. App. 183-86.

Defendants, in contrast, produced evidence that this inference is incorrect. Dr. Russell James, III, a professor at Texas Tech University whose research focuses on charitable giving, provided an expert report explaining that decades of research have demonstrated that most people approach charitable giving, and particularly religious charitable giving, differently than they approach commercial transactions or financial investments. 8th Cir. App. 515-16. Because people typically enter a financial investment for the purpose of maximizing their financial return, economists used to assume that people donate to charity to achieve "a specific social outcome and that as rational, utility-maximizing, economic actors, their goal is to spend the least amount of money to generate the outcome." *Id.* at 519. By the late 1980s, however, economists realized that this "efficiency-focused" model of charitable giving is contradicted by empirical evidence and "lacks predictive power." *Id.* at 519-20. Instead, studies have shown that people are motivated to give for many reasons that are unaffected by the efficacy of the donation, and some will donate even "in the absence of any tangible benefit to the charity or [its] beneficiaries." *Id.* at 522.

For example, some donors are motivated by a religious belief that they should share what they have with others. See *id.* at 521 (discussing research "indicating that U.S. donors engage in religious charitable giving as a form of investment in 'after-life consumption"). Some give to be seen by others as generous or wealthy. *Id.* at 523-24 (research shows that

"increasing the public visibility of a gift increased giving behavior"). Others give because the charity is important to a friend or loved one. *Id* at 525.

Although some donors select a charity because it provides audited financial statements or has been approved by a fiscal oversight body, "research suggests these motivations are, in fact, rare." *Id.* at 527; *id.* ("such information 'did not translate into increased *actual* giving in our study'"). Research also "suggests that offering gift restrictions will induce donations for only a very small minority of donors." *Id.* at 531 (discussing 2017 study published in the *Journal of Behavioral and Experimental Economics* in which offering donors the option of restricting gifts to a particular use increased donations by only 0.3%).

A survey of Gospel for Asia's own donors produced similar results. Now and long before this lawsuit was filed, when a donation is made through the Gospel for Asia website, a "Share Your Comment" screen appears that asks donors to report "what inspired you to donate today." 8th Cir. App. 401. A computer word search of the 44,286 comments submitted since 2011 revealed that only 533 (1.2%) cited the "100% Guarantee." *Id.* at 403. The results were similar when a random sample of 600 donor comments was pulled from the database and the comments were read in full. Just 1.97% of comments in the sample cited the "100% Guarantee" or Gospel for Asia's "stewardship of funds" as the reason they donated. *Id.* at 403-04.

In that same random sample, 32% of donors reported that they were inspired to donate by Gospel for Asia's Mission; 19% cited "God or the Bible (*e.g.*, the Lord called them to donate, or a specific Bible passage referenced);" 17.4% cited a desire to help those in need; 10.5% cited "Family and Friends" (*e.g.*, the donor gave in honor of family or friends, or the donor

gave to teach children about giving); 9% said they gave in response to one of Gospel for Asia's books, radio broadcasts, or in-person presentations; 7.5% cited a desire to minister to women and children; and 1.47% said they were donating on behalf of a Gospel for Asia staff member. 8th Cir. App. 403-04.

3. Plaintiffs did not challenge any of this evidence, and the district court said it "is assuredly true" that "donors give for a number of reasons." Pet. App. 23a. The court nevertheless certified the nationwide RICO class because it thought the "paramount" issue in this case is whether funds donated by class members "for particular items" were "in fact" spent "in the field as designated."[1] *Id.* at 18a. The court was "unpersuaded" by the argument that Rule 23(b)(3)'s predominance requirement is not met because "extensive individualized inquiries" will be needed to determine whether each of the approximately 180,000 class members relied on Gospel for Asia's representations about how donated funds would be spent. *Id.* at 19a. Instead, the court held, "reliance could be proven by class-wide proof" because, notwithstanding the undisputed evidence before the court, it is "logical to infer that the class members relied" on the representations. *Id.* The court thus concluded that if Gospel for Asia "made these representations and then subsequently did not send 100% of the money to the field or spend the money in accordance with its commitments to honor donor designations, that is actionable and can be proven on a class-wide basis." *Id.* at 23a.

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[1] The court also certified a smaller class of Arkansas donors alleging state-law fraud and violations of the Arkansas Deceptive Trade Practices Act, but those claims require plaintiffs to prove they "justifiably relied" on Gospel for Asia's representations, Pet. App. 12a-14a, 32a, so the Rule 23(b)(3) analysis is the same as it is for the RICO class.

4. Defendants filed a timely petition for interlocutory appeal under Rule 23(f), arguing first that the district court fundamentally erred in certifying a class based on a presumption that every class member donated because of the representations about how the funds would be spent. Second, they argued that, by aggregating claims for over $1 billion in damages into a single action, the certification decision creates enormous and undue pressure on the defendants to settle regardless of the merits of the underlying dispute. See Defendants' Petition Under Fed. R. Civ. P. 23(f) at 2-3, No. 18-8012 (8th Cir. Sept. 24, 2018). The Eighth Circuit denied the petition without explanation. Pet. App. 34a. Defendants then filed a timely petition for rehearing or rehearing en banc, which also was denied. *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

I. WHETHER A RICO CLASS ACTION MAY BE CERTIFIED ON A PRESUMPTION OF RELIANCE IS AN IMPORTANT AND RECURRING ISSUE ON WHICH THE CIRCUIT COURTS ARE DIVIDED.

Plaintiffs seek treble damages under RICO on behalf of a class of people who claim to have been injured "by reason of" Gospel for Asia's alleged misrepresentations about the use of donated funds. 18 U.S.C. § 1964(c). To prevail, plaintiffs must show that donors relied on the alleged misrepresentations, see *Bridge* v. *Phx. Bond & Indem. Co.*, 553 U.S. 639, 656 n.6 (2008), and that each class member would not have donated to Gospel for Asia "but for" those misrepresentations, see *Holmes* v. *Secs. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992).

This should have given the district court pause, because claims for money damages in which individual

causation and reliance must be shown obviously "are poor candidates for class treatment, at best." *Patterson* v. *Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001). And when, as here, the class has tens of thousands of members, individual issues would "'overwhelm[] the common ones,' making certification under Rule 23(b)(3) inappropriate," if "proof of individualized reliance" is needed. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407-08 (2014) (quoting *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988)).

The district court held, however, that individualized inquiries were not needed because plaintiffs could presume that all class members donated in reliance on defendants' representations that 100 percent of funds designated for the mission field would be used in the field. Pet. App. 18a-19a. Although the court said it was applying an "inference," it was actually a "presumption"—a conclusion that defendants had the burden of rebutting. See 21B C.A. Wright & K.W. Graham, Jr., *Federal Practice and Procedure: Evidence* §5122.1 (2d ed. 2005) (distinguishing inference and presumption). Indeed, it was an irrebuttable presumption, because the court used it as the basis for class certification despite the substantial, undisputed evidence that donors had different reasons for donating to Gospel for Asia, and most did not give because of the representations about the use of designated funds. That holding warrants this Court's review because it is inconsistent with the decisions of other circuits and this Court.

A. The Decision Below Conflicts With Decisions From Other Circuits

The decision below conflicts with circuit court decisions correctly holding that a RICO class action cannot be certified based on an inference that all class

members relied on defendants' alleged misrepresentations when there is evidence that the inference is not true for many plaintiffs.

1. The Fifth Circuit's decision in *Sandwich Chef of Texas, Inc.* v. *Reliance National Indemnity Insurance Co.*, 319 F.3d 205 (5th Cir. 2003), is illustrative. Plaintiffs were companies that allegedly paid inflated insurance premiums in reliance on invoices that charged rates in excess of the filed rates approved by regulators. *Id.* at 211-12. The district court certified the class on the premise that class-wide reliance could be inferred from evidence "that businesses customarily and reasonably rely on the accuracy of invoices, especially invoices sent by regulated entities." *Id.* at 220. The Fifth Circuit reversed, holding that reasoning "legally flawed" because it ignored defendants' evidence that some class members signed contracts knowing the premiums were higher than the approved rates—evidence that "would eliminate reliance and break the chain of causation." *Id.* The court held that defendants are entitled to rebut plaintiffs' class-wide inference with individualized evidence, and the "trier of fact must ultimately decide whether a specific policyholder thought an invoice complied with the approved rate and paid an inflated premium in reliance on that belief." *Id.* at 220-21. These individualized inquiries "preclude a finding of predominance of common issues of law or fact" and "'defeat the economics ordinarily associated with the class action device.'" *Id.* at 221 (quoting *Patterson*, 241 F.3d at 419).

The Ninth Circuit reached the same conclusion in *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), a RICO case involving claims that casinos misled customers about their chances of winning. The court held that because "one motivation does not 'fit

all,'" a class cannot be certified on the presumption that all customers played the games because of the casino's alleged misrepresentations. *Id.* at 665-66. Some players are casual gamblers who play "as entertainment or a social activity" and are "unconcerned with the odds of winning." *Id.* Others, "in the spirit of taking a calculated risk, may have played fully aware of how the machines operate." *Id.* Thus, "an individualized showing of reliance is required" to establish a causal link between the misrepresentations and each class member's gambling losses. *Id.*

The reasoning of *Sandwich Chef* and *Poulos* fully applies here and should have precluded class certification. As explained above, fewer than 2% of Gospel for Asia's donors report that they were inspired to give by the 100% statement or Gospel for Asia's stewardship of funds. The rest were inspired to give for a variety of other independent reasons. See *supra* pp. 8-9. These donors could not have been harmed by the representations about the use of donor funds, because those representations were not the "but for" cause of the donations.

2. The decision below ignored these decisions, however, and relied instead on decisions from the Second, Tenth, and Eleventh Circuits that certified RICO class actions based on a presumption of reliance. Pet. App. 19a-22a. The court principally relied on *Klay* v. *Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004), which affirmed certification of a class of physicians allegedly defrauded by insurance companies that falsely represented that they would "pay physicians the amounts to which they were entitled." The court reasoned that it "does not strain credulity to conclude that each plaintiff, in entering into contracts with the defendants, relied upon defendants' representations

and assumed they would be paid the amounts they were due." *Id.* at 1259.

The Second Circuit followed that reasoning in *In re U.S. Foodservice Inc. Pricing Litigation*, 729 F.3d 108 (2d Cir. 2013), when it affirmed certification of a class of purchasers allegedly defrauded by invoices that inflated the amounts owed. The court thought it reasonable to infer "that customers who pay the amount specified in an inflated invoice would not have done so absent reliance upon the invoice's implicit representation that the invoiced amount was honestly owed." *Id.* at 120. And the inference makes the case "appropriate … for class certification" by providing "common evidence" by which "'each plaintiff [can] prove reliance.'" *Id.* (quoting *Klay*, 382 F.3d at 1259).

The Tenth Circuit followed a similar approach in *CGC Holding Co.* v. *Broad & Cassel*, 773 F.3d 1076, 1080 (10th Cir. 2014), which affirmed certification of a class of real estate borrowers who alleged that lenders conspired "to obtain non-refundable up-front fees in return for loan commitments the lenders never intended to fulfill." The Tenth Circuit held that class certification based on "an inference of reliance" is proper "where the behavior of plaintiffs and the members of the class cannot be explained in any way other than reliance upon the defendant's conduct." *Id.* at 1089-90.

In none of these cases, however, was there evidence that the inference was not true in many individual cases. Had there been such evidence, class certification would have been improper in the Second Circuit. See *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 220, 225-26 (2d Cir. 2008) (reversing class certification based on a presumption that smokers purchased "light" cigarettes in reliance on representations that they were healthier than "full-flavored" cigarettes be-

cause there was evidence that some smokers "had other, non-health related reasons for purchasing Lights" or "were *aware* that Lights are not, in fact, healthier" and thus individualized inquiries were needed to determine causation).

The case law in the other circuits is unclear. The Eleventh Circuit has not addressed the issue, while the Tenth Circuit has indicated in dicta that if there is evidence "that could rebut the Plaintiffs' common inference of [causation] on an individualized basis," it "might have concluded that individual issues … would predominate at trial." *Menocal* v. *GEO Grp., Inc.*, 882 F.3d 905, 921 (10th Cir.) (quoting *Torres* v. *S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 644 (5th Cir. 2016) (en banc)), *cert. denied*, 139 S. Ct. 143 (2018).

3. Given the stakes of such litigation, the uncertainty created by this conflict is intolerable. At a minimum, it is clear that if this lawsuit had been filed in Houston or Los Angeles, the case would not have been certified as a class action. Rule 23(b)(3) certification should not depend on geography.

In addition, RICO's trebled damages remedy combined with certification of a nationwide class of tens or hundreds of thousands of members exponentially increases "the sheer *magnitude* of the risk" that defendants face compared to individual actions, most of which would never be brought because the donors did not rely on the alleged misrepresentations of which the named plaintiffs complain. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297-99 (7th Cir. 1995). Permitting class certification based on a presumption of reliance therefore creates an incentive for a few individual plaintiffs to seek certification of a massive RICO class action in the hope the defendants will "not wish to roll the[] dice" and will agree to a

settlement to which they would never agree in individual cases. *Id.*

The question of whether a RICO class action may be certified based on a presumption of reliance is also a question that arises in most RICO class actions involving allegations of mail fraud or wire fraud. And RICO cases are being filed with increasing frequency. The latest available data from the federal courts show that substantially more civil RICO suits (1,405) suits were filed in fiscal year 2018 than in fiscal year 2017 (693) or in any year over the past decade.[2] Significantly, this increase is driven in part by an increased use of RICO by plaintiffs alleging fraud.[3]

B. Class Certification Based On A Presumption Of Class-wide Reliance Is Inconsistent With This Court's Precedents

Class certification based on a presumption of class-wide reliance is also inconsistent with this Court's decisions requiring strict compliance the requirements of Rule 23 and the Rules Enabling Act.

1. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast,* 569 U.S. at 33 (quoting *Califano* v. *Yamasaki*, 442 U.S. 682, 700-01 (1979)). Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights." *Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). It "imposes stringent requirements for certification," *id.* at 2310, and plaintiffs must "affirmatively demonstrate [their]

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[2] *See* Transactional Records Access Clearinghouse, Syracuse University, *Anti-Racketeering Civil Suits Jump in 2018* (Oct. 30, 2018), http://trac.syr.edu/tracreports/civil/535/#f2.

[3] *Id.*

compliance" by proving that each requirement is "*in fact*" satisfied. *Wal-Mart*, 564 U.S. at 350. "[A]ctual, not presumed, conformance" with these requirements is "indispensable." *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982). Class certification based on a presumption of common reliance is incompatible with these precedents.

2. Class certification based on a presumption of reliance also modifies substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). It relieves plaintiffs of the burden of proving a critical element of a RICO claim: that the statements that 100% of the funds would go to the mission field or be used for the specific item designated were the "but for" cause of the donations of every class member. It also deprives defendants of the ability to litigate their "defenses to individual claims," in contravention of this Court's holding in *Wal-Mart*, 564 U.S. at 367.

If a plaintiff in an individual trial asked the trier of fact to infer that she must have donated because of a representation that 100 percent of donations designated for the mission field would be sent to the field, the defendants could use her own statements and donation history to refute that inference. Defendants might show, for example, that the donor left a comment on the Gospel for Asia website saying she was inspired to give by the Bible, or to honor a friend who had passed away. See *supra* pp. 8-9. Defendants might get her to admit that she had seen the disclaimer that Gospel for Asia retained discretion as to how the funds were spent and thus gave with the understanding that her donation might not be used for the precise item she checked. See *supra* p.5. But in a class of over 180,000 people, it is not possible for defendants to raise such individualized defenses in a class trial.

To avoid this problem, the court deemed such individualized evidence legally irrelevant because there is "no charity exception for fraud," and no "law requires that the donors' reliance on [Gospel for Asia's] representations be the sole cause of [plaintiffs'] injuries." Pet. App. 23a-24a. That logic is fundamentally inconsistent with this Court's cases interpreting RICO's injury and causation elements. Because "a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it," *Bridge*, 553 U.S. at 656 n.6, a donor who understood that Gospel for Asia retained the discretion to use donor funds for other purposes was not injured if her donation was used for a different item than the one she specified. Similarly, a donor who was inspired to donate to Gospel for Asia for some other reason (*e.g.*, a request by a friend) likewise suffered no injury because the representation about the use of donor funds was not "a 'but for' cause" of her donation. *Id.* at 654.

The failure to allow such individualized defenses is not a mere technicality. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). And it is not an issue that can be relegated to some post-judgment claims process. Because plaintiffs seek a money judgment equal to three times the amount of the donations supposedly caused by the alleged misrepresentations, the defenses to the claims of each individual class member must be resolved to determine the amount of the judgment, if any, for the class. See, *e.g.*, *McLaughlin*, 522 F.3d at 223 (RICO class cannot be certified where determination of judgment for "out-of-pocket losses" requires "an inherently individual inquiry; individual smokers would have incurred different losses depending on

what they would have opted to do, but for defendants' misrepresentations"); *Patterson*, 241 F.3d at 419 ("the individual findings of reliance necessary to establish RICO liability and damages preclude" class certification under Rule 23(b)(3)).

3. Although the Eighth Circuit declined to review the class certification decision in this case, this Court has the authority to review it on this timely petition for writ of certiorari because defendants' petition for interlocutory appeal placed the case "in the courts of appeals." See 28 U.S.C. § 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court" by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree"); see also, *e.g.*, *Hohn* v. *United States*, 524 U.S. 236, 241, 246-47 (1998) (case is "in the courts of appeals" for purposes of section 1254(1) even if "a request to proceed before a court of appeals" is "denied"); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-43 (1982) (reviewing merits of district court decision even though the court of appeals had declined to permit an interlocutory appeal). Indeed, the court of appeals' denial of the petition for interlocutory review itself raises a second question that is independently worthy of this Court's review: whether there should be uniform standards for evaluating petitions for interlocutory appeal under Rule 23(f).

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT ON THE STANDARDS FOR INTERLOCUTORY APPEAL OF CLASS CERTIFICATION ORDERS UNDER RULE 23(F).

Rule 23(f) authorizes the courts of appeals to "permit an appeal from an order granting or denying class-action certification," but it does not specify the

standards the courts should apply. This has resulted in a well-acknowledged circuit split, with different circuits formulating very different standards and one—the Eighth Circuit—refusing even to identify the standard it purports to follow. That situation is untenable. Petitions for interlocutory review of class certification orders should be governed by the same standards in every circuit, and litigants are entitled to know what those standards are. This Court should grant certiorari to resolve the differences in approach among the circuits and establish uniform standards for all of them

A. The Circuits Are Hopelessly Divided On The Standards For Interlocutory Appeals Under Rule 23(f)

1. The First, Second, Fifth, and Seventh Circuits have identified two situations that warrant the grant of interlocutory review in their circuits. The first is when the district court's decision is "questionable" and likely to sound the "death knell of the litigation"—either "because the representative plaintiff's claim is too small to justify the expense of litigation," or because the grant of class certification "put[s] considerable pressure on the defendant to settle." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999), see also *Sumitomo Copper Litig.* v. *Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 138-39 (2d Cir. 2001) (same); *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 293-94 (1st Cir. 2000) (same); *cf. Regents of Univ. of Cal.* v. *Credit Suisse First Bos. (USA), Inc.*, 482 F.3d 372, 379 (5th Cir. 2007) (adopting similar test, at least where class certification "may force a defendant to settle" (quoting Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment)).

These circuits also hold that interlocutory review is appropriate when the appeal will "facilitate the development of the law" by clarifying "some fundamental issues about class actions," *Blair*, 181 F.3d at 835," answering "a legal question about which there is a compelling need for immediate resolution," *Sumitomo Copper*, 262 F.3d at 139, or resolving "an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case," *Waste Mgmt.*, 208 F.3d at 294. See also *Regents*, 482 F.3d at 379 (it is "appropriate to grant leave to appeal" if "a 'certification decision turns on a novel or unsettled question of law'" (quoting Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment)).

2. Although they generally agree that interlocutory review is warranted in those two situations, the Third, Ninth, Tenth and D.C. Circuits add another ground for review: when there is "manifest error in the district court's certification decision." *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952, 955 (9th Cir. 2005) (per curiam). As the Tenth Circuit explained, "where the deficiencies of a certification order are both significant and readily ascertainable, taking into account the district court's discretion in matters of class certification, interlocutory review is appropriate to save the parties from a long and costly trial that is potentially for naught." *Vallario* v. *Vandehey*, 554 F.3d 1259, 1264 (10th Cir. 2009). Significantly, this rationale for interlocutory review applies "even in the absence of a death-knell situation," *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002), and when the error in the class certification decision "does not implicate novel or unsettled legal questions," *Newton* v. *Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001); see also *Chamberlan*, 402 F.3d at 958 (same).

3. The Fourth, Sixth and Eleventh Circuits, in contrast, apply a multi-factor, totality-of-the-circumstances test. The factors identified by the Eleventh Circuit include (1) "whether the district court's ruling is likely dispositive of the litigation by creating a 'death knell' for either plaintiff or defendant"; (2) "whether the petitioner has shown a *substantial* weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion"; (3) "whether the appeal will permit the resolution of an unsettled legal issue that is 'important to the litigation as well as important in itself'"; (4) "the nature and status of the litigation before the district court"; and (5) "the likelihood that future events may make immediate appellate review more or less appropriate." *Prado-Steiman* v. *Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000) (quoting *Mowbray*, 208 F.3d at 294). The Sixth Circuit has adopted a similar list of factors, see *In re Delta Air Lines*, 310 F.3d 953, 960 (6th Cir. 2002) (per curiam), as has the Fourth Circuit, which has further held that "the 'substantial weakness' prong operates on a sliding scale to determine the strength of the necessary showing regarding the other *Prado-Steiman* factors," *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 145-46 (4th Cir. 2001).

4. Finally, the Eighth Circuit, as reflected in its decision here, has steadfastly declined to elaborate on the standards it uses to decide Rule 23(f) petitions. The Eighth Circuit acknowledged the circuit split in *Liles* v. *Del Campo*, but determined that it did not need to "refin[e] a circuit standard" because the "facts in [that] case" did "not favor an interlocutory appeal under any of [the various] formulations." 350 F.3d

742, 746 n.5 (8th Cir. 2003). In subsequent cases, the Eighth Circuit has generally not described its reasons for granting or denying a Rule 23(f) petition,[4] although in one case it cited the Eleventh Circuit's *Prado-Steiman* decision without discussion or elaboration. See *Elizabeth M.* v. *Montenez*, 458 F.3d 779, 783 (8th Cir. 2006). The Eighth Circuit is also among "the least friendly to Rule 23(f) petitions," granting review much less frequently than the neighboring Fifth Circuit, which has been "the most receptive to Rule 23(f) jurisdiction in recent years."[5]

B. This Case Provides An Excellent Vehicle For Resolving The Circuit Split

As this Court has recognized, Rule 23(f) is "the product of careful calibration," intended "to provide 'significantly greater protection against improvident certification decisions,'" but not to an automatic right to appeal that could cause undue delay and expense and "'lead to abuse' on the part of plaintiffs and defendants alike." *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702, 1709–10 (2017). Although the Advisory Committee's Notes make clear that the courts of appeals should have discretion to accept or deny petitions for interlocutory appeal of class certification orders, they also contemplate that the courts "will develop standards for granting review" to achieve that balance. Fed. R. Civ. P. 23(f), advisory committee's notes to

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[4] *See, e.g.*, *Postawko* v. *Mo. Dep't of Corr.*, 910 F.3d 1030 (8th Cir. 2018); *Luiken* v. *Domino's Pizza*, LLC, 705 F.3d 370 (8th Cir. 2013); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Rattray* v. *Woodbury Cty.*, 614 F.3d 831 (8th Cir. 2010).

[5] John H. Beisner, et al., *Study Reveals U.S. Courts of Appeal Are Less Receptive To Reviewing Class Certification Rulings* (Apr. 29, 2014), https://www.skadden.com/insights/ publications/2014/04/study-reveals-us-courts-of-appeal-are-less-recepti.

1998 amendment. This case provides the Court a perfect vehicle for resolving the circuit split and making clear the standards the circuit courts should apply.

First, the Court should grant review and hold that interlocutory review is warranted under Rule 23(f) when an "appeal may facilitate the development of the law" by resolving an important legal question. *Blair*, 181 F.3d at 835. The Advisory Committee's Notes identify this as a situation in which interlocutory review is appropriate, and, as discussed in Section I, *supra*, it is unquestionably present here. Indeed, the question of whether a RICO class may be certified based on a presumption of reliance is particularly appropriate because it is an example of a situation in which class certification induced a judge to alter substantive law "in order to render the litigation manageable." *Blair*, 181 F.3d at 834. "This interaction of procedure with the merits justifies an earlier appellate look. By the end of the case it will be too late—if indeed the case has an ending that is subject to appellate review." *Id.*

Second, the Court should grant review to acknowledge that interlocutory review is warranted under Rule 23(f) when a class certification decision is questionable and is likely to sound the death-knell of the litigation. See Fed. R. Civ. P. 23(f), advisory committee's notes to 1998 amendment. The class here seeks over $1 billion in damages, an amount equal to three times the donations received by Gospel for America over a period of almost ten years. Pet. App. 5a & n.4. Plaintiffs below argued that there was no "death knell" because defendants had vigorously defended the case, and defendants' potential liability was a "meaningless" figure because they provided no "evidence regarding the financial resources of the

parties." Respondents' Opposition to Petition at 3, No. 18-8012 (8th Cir. Oct. 4, 2018) (quoting *Prado-Steiman*, 221 F.3d at 1274). But the fact that defendants "have not yet been persuaded to settle is no reason to decline a Rule 23(f) appeal." *Regents*, 482 F.3d at 379. The death-knell factor, properly understood, is not whether the class judgment would bankrupt the defendants, which it would in most $1 billion cases. It is whether class certification so dramatically changes the stakes of the litigation that no rational defendant would resist the pressure to settle and thus lose the right to appeal an erroneous class certification order after entry of final judgment. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1297-99. The class certification order here clearly satisfies that test.

Finally, the Court should grant review and hold that interlocutory review is warranted under Rule 23(f) when the certification order is based on manifest error and interlocutory review would avoid the waste of resources that would occur if the defective class action were to "proceed through trial to final judgment, only to face certain decertification on appeal and a requirement that the process begin again from square one." *Lienhart*, 255 F.3d at 145. Although this criterion is not expressly mentioned in the Advisory Committee's Notes (and not used in all circuits, see *supra* pp. 20-21), it should apply in all circuits because it so clearly advances the goals of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 1 (the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). As discussed in Section I.B, *supra*, the class certification order in this case is inconsistent with this Court's precedents, and a class-

wide judgment based on a presumption of harm cannot be affirmed on appeal. Thus, efficiency dictates that even if the class certification order would not sound the death knell of this litigation, which it does, interlocutory review should be granted and the class certification order reversed to avoid the expense of a trial based on a fundamentally flawed view of the law.

* * * * *

This case presents a compelling case for this Court's intervention because it is abundantly clear that the Eighth Circuit is a preferred forum for plaintiffs seeking class certification. This lawsuit could just as easily have been brought in the Fifth Circuit, where Gospel for Asia's headquarters is located and where the largest number of its donors reside. If it had been, the class either would not have been certified in the first instance or would have been reviewed and reversed by the Fifth Circuit. Defendants' procedural protections should not vary depending on where plaintiffs file suit. Granting review will permit the Court to bring uniformity to both the standards for class certification under Rule 23(b)(3) and the standards for interlocutory appeal of class certification orders under Rule 23(f).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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